Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-276

TUNNEL BARREL AND DRUM CO., and
SABINO URCIOLI,

Petitioners,

vs.

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION and BOROUGH OF CARLSTADT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	8

APPENDIX:

A. Opinion of the Superior Court of New Jersey, Law Division—Bergen County	1a
B. Opinion of the Superior Court of New Jersey, Appellate Division	7a
C. Order of the Supreme Court of New Jersey	10a

Cases Cited

Bergen County Sewer Authority v. Little Ferry Borough, 15 N. J. Super. 43 (App. Div. 1951), 83 A. 2d 4	6
State of New Jersey v. East Shore, Inc., 132 N. J. N. J. Super. 300 (C. D. 1974), 329 Atl. 2nd 585	5

United States Constitution Cited

Fifth Amendment	2, 5, 7

PAGE

New Jersey Constitution Cited

Article 1, para. 20 7

Statutes Cited

N.J.S.A. 13:17-34 7
N.J.S.A. 20:3-6 7
28 U.S.C. Sec. 1257 2

Other Authorities Cited

29A C.J.S. Eminent Domain (Section 105 (1)) 6
Nichols Eminent Domain (1973) Section 14.02 (5) at 14-19 ..... 6, 7

IN THE

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OCTOBER TERM, 1977

No.

TUNNEL BARREL AND DRUM CO., and SABINO URCIOLI,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

To the Honorable Chief Justice and Associated Justices of the Supreme Court of the United States:

The Petitioners, Tunnel Barrel & Drum Co., a New Jersey Corporation and Sabino Urcioli respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of New Jersey entered in this proceeding on May 17, 1977.

Opinions Below

The denial of the Petition for Certification by the New Jersey Supreme Court; the opinion of the Superior Court of New Jersey (Appellate Division) and the Superior Court of New Jersey (Law Division) appear in the Appendix hereto.

Jurisdiction

This Court's Jurisdiction is invoked under 28 U.S.C. Section 1257.

Questions Presented

Did the destruction of the cul de sac and the elimination of petitioners' easement therein damage the petitioners' premises and result in a diminution of the market value thereof, to constitute a taking of private property for public use without just compensation contrary to U. S. Constitution, Amendment 5?*

Statement of Case

On September 8, 1968, Tunnel Barrel & Drum Co. (hereinafter Tunnel Barrel) purchased its premises from Zone Construction Corp. All parties concede that Tunnel Barrel bought the property (designated at Lot 56-A-4 and Lot 56-A-5 in Block 151) with reference to filed Map No. 6494, dated August 25, 1966; which depicted a cul de sac with a dead end at the terminus of Triangle Boulevard. This cul de sac is directly adjacent to and abuts upon Tunnel Barrel's property.

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* U. S. Constitution, Amendment 5 "* * * nor shall private property be taken for public use without just compensation."

The existence of the cul de sac at the terminus of Triangle Boulevard was the inducement for Tunnel Barrel to purchase this land and to erect the special purpose building thereon, especially tailored to its needs and purposes.

Subsequent to the erection of the special purpose building, a street, known as Veterans Boulevard, was laid out running in part contiguous to Tunnel Barrel's premises and the cul de sac, which street, among others, was dedicated by the owners thereof and accepted by Carlstadt as a public street and highway by Ordinance No. 691, on September 20th, 1971. At all times prior to the creation, dedication, and acceptance by Carlstadt, the street, which became known as Veterans Boulevard, was in an area of woodlands, and unimproved.

Thereafter, Carlstadt and the Hackensack Meadowlands Development Commission (which was created and came into being after Tunnel Barrel acquired said lands), eliminated and destroyed the cul de sac and opened the terminus of Triangle Boulevard and created an intersecting highway with the newly dedicated Veterans Boulevard.

Thereafter, the petitioners instituted a civil action in the Superior Court of New Jersey, requesting the following relief in an inverse condemnation proceeding:

(1) that it be determined that the Respondents have power of condemnation;

(2) that Commissioners be appointed to determine the value of Petitioners' rights and damages to the remaining property resulting from the destruction of the cul de sac;

(3) that Petitioners have judgment for the market value of the rights taken and for damages resulting from such taking.

All parties moved for Summary Judgments in the Trial Court which Court considered the pleadings and oral arguments, whereupon it denied Tunnel Barrel's motion for a Summary Judgment and granted a Summary Judgment to Hackensack Meadowlands Development Commission and Carlstadt that there was no compensable taking nor damages because there was other reasonable means of access to Tunnel Barrel's premises.

The Court below decided the matter *sub judice* on its findings that there existed reasonable means of access to the petitioners' premises and it did not give rise to a claim for a compensable taking and as such the Court did not consider the effect of the diminution in the market value of the petitioners' premises by the destruction of the cul de sac and the petitioners' easement therein (1a).

Petitioners filed an appeal therefrom to the Appellate Division of the New Jersey Superior Court. The Appellate Division affirmed, in a per curium opinion, the judgment of the Trial Court substantially for the same reasons expressed by the Trial Judge in the Law Division of the Superior Court of New Jersey (7a).

Petitioners filed a Petition for Certification of the Appellate Division's decision to the New Jersey Supreme Court, and sought Certification of the legal question involved that the taking of petitioners' easement was a taking of private property for public use, without just compensation.

The Petition for Certification was denied by the New Jersey Supreme Court on May 17, 1977 (10a).

Reasons for Granting the Writ

Petitioners respectfully submit that there are special and important reasons for granting the requested Writ of Certiorari in this case.

The Superior Court of New Jersey (Appellate Division), in affirming the Summary Judgment of its Law Division violated the due process guarantee of the United States Constitution, Amendment 5, in that Petitioners' private property was taken for public use, without just compensation.

The taking and destruction of the cul de sac and the elimination of petitioners' easement therein resulted in a destruction of its easement and a diminution of the market value of petitioners' adjoining premises, the end result being a taking of private property for public use, without just compensation.

See *State of New Jersey* v. *East Shore, Inc.*, 131 N.J. Super. 300 (C.D. 1974) 329 Atl. 2nd 585 at page 591 wherein it states:

> "The conveyance of lots by reference to a map upon which streets, rights of way, beaches and docks are laid out impliedly creates private rights in those streets, rights of way, beaches and docks shown. See *Clark* v. *Elizabeth*, 40 N.J.L. 172-174 (E&A 1878); *State* v. *Birch*, 115 N.J. Super. 457, 464, 280 A2d 210 (App.Div. 1971); Cunningham and Tischler, '*Dedication of Land in New Jersey*' 15 *Rutgers L.Rev.* 377, 404 (1961). Once these rights are created, they cannot be destroyed unless just compensation is paid. See 15 *Rutgers L. Rev.* at 405; *Muller* v. *N.J. Highway Authority*, 59 N.J. Super. 583, 589, 158 A2d 843 (App.Div.1960)."

In 29A CJS Title *Eminent Domain* Section 105 (1), it is said:

> "The Grantee of a lot which is sold according to plan on which streets or alleys not previously opened or proposed as a public street as plotted out by the Grantor, acquires an easement over the streets and alleys as a private right of property of which he cannot be deprived without compensation."

In *Bergen County Sewer Authority* v. *Little Ferry Borough,* 15 N.J. Super. 43 (App.Div. 1951), 83 A2d 4 at p. 11, it was held:

> "The rule is that the landowner is entitled to receive the fair price for any use for which the land has a commercial value of its own in the immediate present or in reasonable anticipation in the near future. This concerns the present market value having the reasonably anticipated use in the near future in view. . . ."

In the matter *sub judice,* the plaintiffs' easement which is its property has been taken by the elimination of the cul de sac and the opening of a cross highway from Veterans Blvd. into Triangle Blvd. In a strict sense, inverse condemnation is used to obtain compensation for damages resulting from property "taken". In approximately twenty-five states where their constitutions provide that property shall not be taken or damaged for public use without just compensation, the theory permits recovery when land is injured to a lesser degree. The damage clause has been added to the various state constitutions ostensibly in an effort to enlarge the rights of recovery available to landowners under the federal and then existing state constitutions. Cf. Nichols, *Eminent Domain,* Section 14.02(5)

at 14-19 (1973). The New Jersey Constitution has such a damage clause, Article I, para. 20.*

The Court below did not consider the diminution in value of the plaintiff's property resulting from the destruction and elimination of the cul de sac but the Court decided the matter upon the grounds that even in view of the destruction of the cul de sac, the plaintiff still had reasonable means of access to its premises and thus was not legally damaged.

The respondents arbitrarily appropriated the petitioners' property without condemnation or compensation for damages resulting from such taking, even though respondents had Eminent Domain power, pursuant to N.J.S.A. 13:17-34, which was to be carried out in accordance with N.J.S.A. 20:3-6, all in violation of the United States Constitution, Amendment 5, and the New Jersey Constitution 1947, Article I, para. 20.

The record clearly shows that the petitioners purchased the property abutting the cul de sac by reference to a filed map which created private rights to petitioners and, thereafter, they erected thereon a building adopted for a particular purpose; the elimination and destruction of said cul de sac injuriously affected the property and reduced its market value; said elimination and destruction of the cul de sac was for a public use and, therefore, requires that compensation be paid therefor.

The New Jersey Courts decided the matter on the limited issue of reasonable means of access to the petitioners' property and disregarded the taking of the petitioners' rights in the easement, and thus denied to the petitioners the rights guaranteed by the United States Constitution, Amendment 5 and the New Jersey Constitution (1947) Article 1, para. 20.

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* N. J. Constitution, Article I, para. 20, "private property shall not be taken for public use without just compensation."

The issues under the facts involved in this litigation are of novel import and are significant in that citizens rights guarantee under our Constitution shall not be abridged.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the final judgment and opinions of the Courts of the State of New Jersey.

Respectfully submitted,

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APPENDIX A

Opinion of the Superior Court of New Jersey, Law Division—Bergen County

(Filed—June 9, 1976)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—BERGEN COUNTY

DOCKET L-36446-72

TUNNEL BARREL & DRUM CO., INC. and SABINO URCIOLI,

Plaintiffs,

v.

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION and BOROUGH OF CARLSTADT,

Defendants.

Argued: May 28, 1976 Decided: June 9, 1976

Samuel J. Davidson, Esq., attorney for plaintiffs.

William F. Hyland, Attorney General of the State of New Jersey by Thomas P. Weidner, Deputy Attorney General, attorney for defendant Hackensack Meadowlands Development Commission.

Joseph P. Winberry, Esq., attorney for defendant Borough of Carlstadt.

TRAUTWEIN, A.J.S.C.

Appendix A

This is an inverse condemnation action. Plaintiffs Tunnel Barrell & Drum Co., Inc. and Sabino Urcioli (Tunnel Barrel) allege that certain actions taken by defendant Hackensack Meadowands Development Commission (HMDC) and defendant Borough of Carlstadt with respect to the opening and improvement of certain streets constitute a taking of Tunnel Barrel's property without the payment of just compensation. All parties have moved for summary judgment pursuant to *R.* 4:46-1 *et seq.* The Court has considered the briefs, affidavits, interrogatories, and oral argument. The facts of the case are quite simple and are not in any material respect controverted. The case is clearly ripe for summary judgment. Based upon all of the available legal input, the Court makes the following findings of fact.

On August 25, 1966 a certain sub-division map known as "Triangle Industrial Park II—Map No. 6494" was filed in the Bergen County Clerk's office. Map No. 6494 depicted certain properties located in the Borough of Carlstadt including the property of Tunnel Barrel which is designated Lot 56-A-4 and Lot 56-A-5 in Block 151. Map No. 6494 also depicts a cul-de-sac or dead end at the terminus of Triangle Boulevard. This cul-de-sac is directly adjacent to Tunnel Barrel's property and is the subject matter of the suit.

On August 15, 1967 another sub-division map known as "Gotham Industrial Park II—Map No. 6611" was filed in the Bergen County Clerk's office. Map No. 6611 depicts property directly adjacent and north/northwest of Tunnel Barrel's premises. Map No. 6611 depicts a temporary cul-de-sac directly within the right of way of Veterans Boulevard. This temporary cul-de-sac does not appear to be the same cul-de-sac which is the subject matter of this

Appendix A

suit although the cul-de-sacs are alleged to be identical by Carlstadt. The subject cul-de-sac is not and was never in the past located within the right of way of Veterans Boulevard. The subject cul-de-sac was located due north of Veterans Boulevard. Thus the Court concludes that the cul-de-sac depicted in Map No. 6611 is not the same cul-de-sac as shown on Map No. 6494 although the physical proximity to one another is extremely close.

On September 6, 1968 Tunnel Barrel purchased its premises from Zone Construction Corp. All parties concede that Tunnel Barrel bought the property with reference to the filed Map No. 6494.

On or about May 3, 1973 the HMDC, with the concurrence of Carlstadt, approved a sub-division application which was submitted by Kenilworth Associates. Kenilworth Associates owns property contiguous to Tunnel Barrel's. The proposed sub-division implemented certain road intersection and related traffic safety improvements in the vicinity of the intersection of Veterans Boulevard and Triangle Boulevard. These improvements consisted of the elimination of the subject cul-de-sac and construction of a through street and intersection of Veterans Boulevard and Triangle Boulevard. The plan also called for the construction of curbs and the restriction of ingress and egress within 50 feet on all sides of the intersection. Tunnel Barrel admits that it continues to have access to its property, albeit somewhat limited due to the elimination of the cul-de-sac and curb cut which was formerly located within 50 feet of the intersection of Veterans Boulevard and Triangle Boulevard. Tunnel Barrel also admits that its vehicles continue to be able to enter and leave its property, but again claims that such ingress and

egress is restricted due to the elimination of the curb cut and creation of the Veterans Boulevard/Triangle Boulevard intersection.

CONCLUSIONS OF LAW

It is conceded that no actual property of Tunnel Barrel was taken by the HMDC or Carlstadt for public use. The claim is that the elimination of the cul-de-sac amounted to a taking. Tunnel Barrel claims that when it purchased Lots 56-A-4 and 56-A-5 in Block 151 in 1968 by reference to Map No. 6494, it received an implied easement in the cul-de-sac. Thus, claims Tunnel Barrel, when the cul-de-sac was cut, opened, and a through street created, the easement was taken by HMDC and Carlstadt. Tunnel Barrel's claim amounts to an assertion that its private rights in the easement were appropriated by a public entity without the payment of just compensation. The filing of Map No. 6494 is conceded by all parties to have included a dedication of private land to public use. This dedication clearly gave rise to certain private rights in Tunnel Barrel. When a developer plots a tract of land into building lots and prepares a map disclosing streets abutting such lots, if he conveys by reference to the map and the purchaser relies thereon, an intention to dedicate such streets may be assumed. *State* v. *Birch,* 115 N. J. Super. 457 (App.Div. 1971). In such a case even in the absence of an acceptance by the municipal authorities or in case of a vacation, the purchaser of a building lot abutting one of such streets in a development retains *a private easement to the extent of a perpetual and indefeasible right of access to his lot over the* dedicated street. *State* v. *Birch, supra.*, 115 N.J. Super. at p.464; *Highway Holding Co.* v. *Yara Engineering Corp.*, 22 N.J. 119, 126-128, 134 (1956).

Tunnel Barrel cites the case of *State* v. *East Shore Inc.*, 131 N.J. Super. 300 (Chan.Div. 1974) for the proposition that the easement it holds is something more than a right of access. However, the passage upon which Tunnel Barrel relies in *East Shore* (131 N.J. Super. at 311) cites for authority *State* v. *Birch, supra,* 115 N.J. Super. at p. 464 and *Mueller* v. *N.J. Highway Authority,* 59 N.J. Super. 583 (App.Div. 1960). Both *Birch* and *Mueller* limit the easement to an indefeasible and perpetual right of access. It is plain that under New Jersey law, Tunnel Barrel's position is without merit.

Without question Tunnel Barrel's pre-existing easement of access to and from its property constitutes a right of property of which it cannot be deprived unless just compensation is paid. *Mueller* v. *N.J. Highway Authority, supra,* 59 N.J. Super. 589; *cf. Tubular Service Corp.* v. *Comm. State Highway Dept.*, 77 N.J. Super. 556 (App. Div.1963). However, Tunnel Barrel continues to have access to and from its property and it remains able to move its vehicles on and off its premises. A property owner is not entitled to access at every point between it and the highway but only to free and convenient access to his property and the improvements on it and reasonable highway regulations will not give rise to a claim for a compensable taking. *State* v. *Kendall,* 107 N.J. Super. 248, 252 (App.Div.1969); *Mueller* v. *N.J. Highway Authority, supra,* 59 N.J. Super. 595. Although what constitutes reasonable access generally is a question of fact, Tunnel Barrel does not allege that its remaining access is unreasonable. Indeed, Tunnel Barrel's only claim is that it has been inconvenienced and forced to expend additional labor costs and effort in the normal use of the premises for its business. Based upon the fore-

going, the Court concludes that there has been no compensable taking established upon these facts. Tunnel Barrel's motion for summary judgment is denied. Summary judgment is granted on behalf of HMDC and Carlstadt.

Counsel shall submit an appropriate order.

APPENDIX B

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—February 25, 1977)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—BERGEN COUNTY
DOCKET L-36446-72

TUNNEL BARREL & DRUM CO., INC. and SABINO URCIOLI,

Plaintiffs-Appellants,

v.

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION and BOROUGH OF CARLSTADT,

Defendants-Respondents.

Submitted February 15, 1977—Decided February 25, 1977.

Before Judges Matthews, Seidman and Horn.

On appeal from the Superior Court, Law Division, Bergen County.

Mr. Samuel J. Davidson, attorney for appellants, (Mr. Edward J. Liguori, on the brief).

Appendix B

Mr. William F. Hyland, Attorney General, attorney for respondent Hackensack Meadowlands Development Commission (Ms. Erminie L. Conley, Deputy Attorney General, of counsel; Mr. David B. Harris, Deputy Attorney General, on the brief).

Mr. Joseph P. Winberry, attorney for respondent Borough of Carlstadt.

PER CURIAM

Plaintiffs are the owners of a tract of land in Carlstadt, Bergen County, which had a curb cut fronting on a closed cul-de-sac on Triangle Boulevard. They claim that a street known as Veterans Boulevard was laid out which ran in part contiguous to their premises and alongside of the cul-de-sac, resulting in the elimination of the cul-de-sac, so that Triangle Boulevard now enters Veterans Boulevard. Plaintiffs urge that the conversion of the cul-de-sac into a public through street was a taking without compensation, and seek "inverse condemnation."

Actually, what occurred was that the owner of the contiguous land submitted a subdivision plan to the Hackensack Meadowlands Development Commission to improve the area by eliminating the cul-de-sac and constructing a road intersection for the two boulevards and a continuous curb. Plaintiffs had five curb cuts, three on Veterans Boulevard, and two on Triangle Boulevard. The proposed improvement would affect only one curb cut without eliminating or impairing ingress or egress for the other four.

Both sides moved for summary judgment. The trial judge denied plaintiffs' motion and granted that of defendants. He held, in a written opinion, that no actual property of plaintiffs was taken for public use; that the

Appendix B

only claim asserted, that of the elimination of the cul-de-sac, amounted to a taking of private rights in an easement; that while plaintiffs had a right of access of which it could not be deprived, each continued to have access to and from its property; and that a property owner is not entitled to access at every point between his property and the highway but only to free and reasonable access. He concluded that there being no claim that the remaining access was unreasonable, no compensable taking was established.

We are satisfied that the trial judge accurately stated the applicable law and correctly applied it to the facts of the case. *State* v. *Interspace Corp.*, 130 N.J. Super. 322, 327 (App. Div. 1974). And see *State* v. *Stulman*, 136 N.J. Super. 148, 155 (App. Div. 1975).

We affirm substantially for the reasons expressed by Judge Trautwein in his written opinion.

APPENDIX C

Order of the Supreme Court of New Jersey
(Filed—May 17, 1977)

C-699 SEPTEMBER TERM 1976

TUNNEL BARRELL & DRUM CO., & SABINO URCIOLI,
Plaintiffs-Petitioners,

vs.

HACKENSACK MEALOWLANDS DEVELOPMENT COMMISSION & BORO. OF CARLSTADT,
Defendants-Respondents.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Worralll F. Mountain, Presiding Justice, at Trenton, this 17th day of May, 1977.

FLORENCE R. PESKOE
Clerk

Supreme Court, U. S.
FILED
SEP 14 1977
MICHAEL RODAK, JR., CLERK

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Supreme Court of the United States

OCTOBER TERM, 1977

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TUNNEL BARREL AND DRUM CO., and
SABINO URCIOLI,

Petitioners,

vs.

HACKENSACK MEADOWLANDS DEVELOPMENT
COMMISSION and BOROUGH OF CARLSTADT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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TABLE OF CONTENTS

	PAGE
JURISDICTION	1
QUESTION PRESENTED	2
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT:	
Point I—The court should deny the petition for a writ of *certiorari* because the principles of law applicable to petitioners' allegation that construction of the intersection constituted a taking of property are clearly established, are not the subject of a conflict in decisions, and were correctly applied by the Superior Court of New Jersey	5
Point II—The petition for a writ of *certiorari* should be denied because the petition was received by the court after the period specified by 28 U.S.C. §2101	9
CONCLUSION	10

Cases Cited

Delaware River Commission v. Colburn, 310 U.S. 419 (1940)	7
Department of Banking of Nebraska v. Pink, 317 U.S. 264 (1942)	9
Gibson v. United States of America, 166 U.S. 269 (1897)	7

PAGE

Highway Holding Co. v. Yara Engineering Corp., 22 N.J. 119 (1956) 8, 9

Iowa Highway Commission v. Smith, 248 Iowa 869, 82 N.W. 2d 755 (Sup.Ct. 1957) 8

Johnson v. United States, 479 F. 2d 1383 (Ct. Claims 1973) 8

Mueller v. New Jersey Highway Authority, 59 N.J. Super. 583 (App.Div. 1960) 8

Rust Land & Lumber Co. v. Jackson, 250 U.S. 71 (1919) 9

State by Comm'r of Transportation v. Charles Investment Corp., 143 N.J. Super. 541 (LawDiv. 1976) 8

State Highway Commissioner v. Kendall, 107 N.J. Super. 248 (App.Div. 1969) 8

State v. East Shore, Inc., 131 N.J. Super. 300 (Ch. Div. 1974) 9

State v. Interspace Corp., 130 N.J. Super. 322 (App. Div. 1974) 8

State v. Monmouth Hills, Inc., 110 N.J. Super. 449 (App.Div. 1970) 8

Transportation Company v. Chicago, 99 U.S. 635 (1878) 5, 7

Tubular Service Corporation v. Commissioner, 40 N.J. 331 (1963) 8

United States v. Certain Lands in the County of Cook, State of Minnesota, 248 F. Supp. 681 (D. Minn. 1965) 7

PAGE

United States v. Alderson, 53 F. Supp. 528 (S.D.W. Va. 1944) 7

United States v. Certain Lands in the State of New Jersey, 439 F. 2d 670 (3rd Cir. 1971) 7, 8

Winn v. United States, 272 F. 2d 282 (9th Cir. 1959) 7

Statutes Cited

FEDERAL

28 U.S.C.:

§1257 1

§2101 9

NEW JERSEY

N.J.S.A. 13:17-13 3

N.J.S.A. 13:17-14 3

Regulation Cited

N.J.A.C. 19:5-7(m) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-276

TUNNEL BARREL AND DRUM CO., and
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Petitioners,

vs.

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION and BOROUGH OF CARLSTADT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Jurisdiction

Petitioners assert jurisdiction on the basis of 28 U.S.C. §1257. However, respondent Hackensack Meadowlands Development Commission asserts that the court should deny the petition on the basis of lack of jurisdiction because same was filed out of time. The order of the Su-

preme Court of New Jersey denying petitioners' petition for certification was entered on May 17, 1977. The present petition was filed on August 17, 1977, which is more than ninety days after the denial of the petition for certification.

Question Presented

Did approval by the Hackensack Meadowlands Development Commission of a subdivision plan for replacement of a cul-de-sac by a through intersection, which replacement allegedly made access to petitioners' premises less convenient, constitute a taking of property for public use and entitle petitioners to compensation?

Counter-Statement of the Case

On September 6, 1968, petitioners acquired portions of Lots 56A-4 and 56A-5, Block 151 on the tax map of the Borough of Carlstadt, Bergen County, New Jersey. Petitioners allege that at the time of this purchase the only roadway leading from and to their premises was Triangle Boulevard, which ended in a closed cul-de-sac adjacent to its property. Subsequent to this purchase, a street known as Veteran's Boulevard was laid out running contiguous to petitioner's premises, perpendicular to Triangle Boulevard and adjacent to the closed cul-de-sac. Veteran's Boulevard was accepted as a public street by the Borough of Carlstadt on September 20, 1971.*

* The dedication and acceptance of Veteran's Boulevard is not the subject of this action. Respondent, Borough of Carlstadt, asserts that maps on file in the County Clerk's Office prior to 1968 indicate that the cul-de-sac was temporary and Veteran's Boulevard was dedicated as a proposed street.

On January 21, 1972, Kennilworth Associates (the owner of certain lands contiguous to those owned by petitioners) submitted a subdivision plan to the Hackensack Meadowlands Development Commission (the "Commission") to implement certain road intersection and related traffic safety improvements to minimize and/or eliminate dangerous conditions affecting vehicular and pedestrian traffic in the vicinity of Veteran's and Triangle Boulevards. Said subdivision plan was submitted to the Commission pursuant to N.J.S.A. 13:17-13 and 13:17-14 which empower the Commission to approve or dispprove subdivision plans and building permit applications. After discussions between the Borough of Carlstadt, Kennilworth Associates and the Commission, the Commission approved said subdivision plan on May 3, 1973. These plans have since been executed by Kennilworth Associates.

The subdivision plan accomplished two specific objectives. First, the plan eliminated the closed cul-de-sac and resulted in a road intersection for Veteran's and Triangle Boulevards.* The rationale for this improvement was that Triangle Boulevard exceeded the recommended maximum length for cul-de-sac streets under the Commission's subdivision regulations. N.J.A.C. 19:5-7.5(m). Second, the subdivision plan resulted in the construction of curbs in the area of the intersection to insure a continuous curb of approximately six inches in height within fifty feet of the intersection of Veteran's and Triangle Boulevards. This improvement is consistent with sound traffic engineering practices and furthers the safety of vehicular and pedestrian traffic at the intersection.

The improvements in question are not conducted on nor do they utilize any land owned by the petitioners. Fur-

* In fact, prior to construction of the intersection, vehicular traffic effectively destroyed the curb separating the cul-de-sac from Veteran's Boulevard and created a *de facto* intersection.

theremore, the improvements do not eliminate egress from and ingress to petitioners' premises. Petitioners had five curb cuts providing access to Veteran's and Triangle Boulevards, three along Veteran's Boulevard, each 18 feet in length, and two curb cuts along Triangle Boulevard, 36 and 24 feet in length respectively.* The improvements eliminated only one of these curb cuts, namely, the curb cut of approximately 24 feet in length along Triangle Boulevard.

Petitioners filed an inverse condemnation action against the present respondents in the Chancery Division of the Superior Court of New Jersey. That court granted defendants' motions for summary judgment (Pa1 to Pa6). The judgment of the Chancery Division was affirmed *per curiam* by the Appellate Division (Pa7 to Pa9). A petition for certification was denied by the New Jersey Supreme Court (Pa10) and the present petition followed.

*The Commission has measured these curb cuts with slightly different results. The Commission's figures show the three cuts on Veteran's Boulevard to be 20, 25 and 20 feet each and the two curb cuts along Triangle Boulevard to be 23 feet (the curb cut affected) and 37 feet. However, these minor discrepancies do not affect the fact that petitioners continue to have access to their premises.

ARGUMENT

POINT I

The Court should deny the petition for a writ of *certiorari* because the principles of law applicable to petitioners' allegation that construction of the intersection constituted a taking of property are clearly established, are not the subject of conflict in decisions, and were correctly applied by the Superior Court of New Jersey.

The question presented by this petition for writ of *certiorari* concerns the point at which changes in traffic patterns as a result of improvements to public roads become a taking for which the owner of adjoining land is entitled to compensation. More specifically, petitioners claim entitlement to compensation on the basis of construction of a through intersection where there had previously been a cul-de-sac, as well as the resultant claimed interference with truck access to petitioner's property. It is, however, uncontroverted that petitioners continue to have the use of four of the five curb cuts which served their property prior to construction of the intersection in question and petitioners admittedly have a means of ingress to and egress from their premises. This question is one which arises from the unusual factual circumstances noted above, and thus presents a narrow issue of law which is unlikely to recur, and which was properly decided by the New Jersey courts.

As long ago as 1878, in *Transportation Company* v. *Chicago,* 99 U.S. 635, this Court set forth the principles applicable to petitioners' claim that inference with their use of a public street constitutes a compensable taking of their property. In that case, the City of Chicago significantly reduced (albeit temporarily) a property owner's

land and water access to its premises. The interference with access resulted from the construction of a tunnel which would serve to continue a city street under the Chicago River; said tunnel, like the intersection construction at issue in the present petition, would further the movement of traffic along a public street. The court applied the constitutional prohibition against a taking for public use without just compensation to the facts just stated as follows:

> "* * * The decisons to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542 and notes. The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly* v. *Green Bay Company,* 13 Wall. 166, and in *Eaton* v. *Boston, Concord & Montreal Railroad Co.,* 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry

> was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient." 99 U.S. at 642.

Similarly, the Court held in *Gibson* v. *United States of America,* 166 U.S. 269 (1897), that interference with a property owner's access by water incidental to constructing a dam for improvement of navigation did not constitute a compensable taking. The improvement of motor vehicle transit involved in the instant matter is analagous to the navigational needs in *Gibson. See, Delaware River Commission* v. *Colburn,* 310 U.S. 419 (1940) (no requirement under interstate compact that property owner be compensated for limitation of access to public road due to bridge construction).

Lower federal courts have had no difficulty in applying the principles of *Gibson* v. *United States* and *Transportation Company* v. *Chicago,* and there has been no conflict of decision with respect to the issues raised herein. When the issue has been raised, the courts have consistently responded that a landowner is entitled to no more than reasonable access to and use of public roads and that no compensable taking occurs so long as the landowner is left with such access. *United States* v. *Certain Lands in the State of New Jersey,* 439 F.2d 670 (3rd Cir. 1971); *Winn* v. *United States,* 272 F.2d 282 (9th Cir. 1959);* *U. S.* v. *Certain Lands in the County of Cook, State of Minnesota,* 248 F. Supp. 681 (D. Minn. 1965); *United States* v. *Alderson,* 53 F. Supp. 528 (S.D. W. Va. 1944);

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* *Winn* v. *United States* held that inconvenience resulting from increased travel distance did not amount to a compensable taking. This holding is directly applicable to the inconvenience and expense which the present petitioners allege as the sole effect of the construction in question on use of their property (Pa5).

Johnson v. *United States,* 479 F.2d 1383 (Ct. Claims 1973).

The courts of New Jersey have reached similar conclusions. *Tubular Service Corporation* v. *Commissioner,* 40 N.J. 331 (1963), affirming 77 N.J. Super. 556 (App. Div. 1963); *State* v. *Interspace Corp.,* 130 N.J. Super. 322, 328 (App. Div. 1974); *State* v. *Monmouth Hills, Inc.,* 110 N.J. Super. 449 (App. Div. 1970); *State Highway Commissioner* v. *Kendall,* 107 N.J. Super. 248 (App. Div. 1969); *Mueller* v. *New Jersey Highway Authority,* 59 N.J. Super. 583 (App. Div. 1960); *State by Comm'r of Transportation* v. *Charles Investment Corp.,* 143 N.J. Super. 541 (Law Div. 1976). In *Mueller* v. *New Jersey Highway Authority,* supra, 59 N.J. Super. 583, 595 the court stated:

> "The general rule is that the property owner is not entitled to access to his land at every point between it and the highway but only to 'free and convenient access to his property and the improvements on it.'" Quoting *Iowa Highway Commission* v. *Smith,* 248 Iowa 869, 82 N.W. 2d 755 (Sup. Ct. 1957).

In addition to inconvenient access, petitioners allege the taking of a purported easement in the cul-de-sac which existed prior to the intersection construction. It is clear, however, that petitioners had no private property interest in said cul-de-sac.

While there may be private rights in the use of private rights of way, the only private right to the use of public street is one of access to the street. *Highway Holding Co.* v. *Yara Engineering Corp.,* 22 N.J. 119, 134-135 (1956); *United States* v. *Certain Lands in the State of New Jersey,* 439 F.2d 670, 673 (3rd Cir. 1971). There is no allegation in the instant matter that petitioners were

left "without any access whatsoever." *Highway Holding Co.* v. *Yara Engineering Corp., supra,* 22 N.J. at 136. The property rights which a transferee obtains in streets shown on a map referred to in a conveyance, *State* v. *East Shore, Inc.,* 131 N.J. Super. 300 (Ch. Div. 1974), are those rights defined in *Highway Holding Co.* Petitioners were not deprived of this right of access (Pa8).

In short, the principles governing petitioners' claim that construction of the intersection in question constituted a taking of their property are clearly established and were correctly applied by the Superior Court of New Jersey. Moreover, the question presented is a narrow one arising from unusual factual circumstances, and is unlikely to recur.

POINT II

The petition for a writ of *certiorari* should be denied because the petition was received by the Court after the period specified by 28 U.S.C. §2101.

It is a statutory requirement that application for a writ of *certiorari* to a state court in a civil matter be made within ninety days after the entry of the decree below. 28 U.S.C. §2101. In the present case, the application was made more than ninety days after the entry of the order of the New Jersey Supreme Court denying petitioners' petition for certification (Pa10). An application filed after the statutory period has elapsed should be denied for lack of jurisdiction. *Department of Banking of Nebraska* v. *Pink,* 317 U.S. 264 (1942); *Rust Land & Lumber Co.* v. *Jackson,* 250 U.S. 71 (1919).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of *certiorari* should be denied.

Respectfully, submitted,

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